RECORD AND BRIEFS

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No. 16-498

In the Supreme Court of the United States

DAVID PATCHAK, PETITIONER

v.

RYAN ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner sought to challenge a decision by the Secretary of the Interior taking land into trust for an Indian tribe. While his suit was pending before the district court, Congress enacted legislation that reaffirmed the trust status of the land, ratified the Secretary's decision to the take the land into trust, and provided that "[n]otwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land [at issue in this case] shall not be filed or maintained in a Federal court and shall be promptly dismissed." Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2, 128 Stat. 1913 (2014). The district court dismissed petitioner's suit, and the court of appeals affirmed. The questions presented are:

1. Whether a statute that excludes a certain class of cases or controversies (including a pending case) from the jurisdiction of federal courts, but does not direct the court to make any particular findings or issue a judgment on the merits for a particular party, intrudes on the power of the judiciary contrary to separation-of-powers principles.

2. Whether the Act violates the Due Process Clause of the Fifth Amendment.

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2. Whether the Act violates the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 828 F.3d 995. The opinion of the district court (Pet. App. 27a-48a) is reported at 109 F. Supp. 3d 152.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2016. The petition for a writ of certiorari was filed on October 11, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians, known as the Gun Lake Tribe (the Tribe), was formally recognized by the federal government in 1998, the Tribe asked the Department of the Interior to take a 147-acre property (the Brad-

ley Property) near the Township of Wayland, Michigan, into trust for the Tribe. See 70 Fed. Reg. 25,596 (May 13, 2005). The Secretary of the Interior (the Secretary) took the land into trust for the Tribe pursuant to authority granted by Congress in the Indian Reorganization Act, 25 U.S.C. 5108. See Pet. App. 31a-32a. The Tribe intended to use the property for gaming and built a casino there, which has now been in operation for several years. *Id.* at 32a.

Petitioner, a non-Indian who lives about three miles from the property, sought review of the Secretary's land-into-trust decision under the Administrative Procedure Act (APA), 5 U.S.C. 706. Petitioner alleged that the Secretary's land-into-trust decision violated 25 U.S.C. 5108 because the Tribe was not recognized by the federal government when the Indian Reorganization Act was enacted in 1934. Pet. App. 32a. He alleged injuries from expected increases in traffic and property taxes, as well as "an irreversible change in the rural character of the area" and a "weakening of the family atmosphere of the community." C.A. App. A19 ¶ 9; Pet. App. 4a.

The district court held that petitioner's alleged injuries were not within the "zone of interests" protected by Section 5 of the Indian Reorganization Act and dismissed petitioner's suit for lack of prudential standing. C.A. App. A171; see *id.* at A166-A175. The court of appeals reversed, 632 F.3d 702, and this Court affirmed the court of appeals' decision, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012). The Court held that petitioner had standing to challenge the legality of the Secretary's land-into-trust decision through an APA claim. *Id.* at 2208. The Court further held that peti-

tioner's suit was not precluded by 5 U.S.C. 702, which provides that the waiver of sovereign immunity contained in the APA "does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought' by the plaintiff." *Patchak*, 132 S. Ct. at 2204 (citing 5 U.S.C. 702). Although the Quiet Title Act, 28 U.S.C. 2409a, which waives the United States' sovereign immunity for suits to adjudicate disputed title to real property in which the United States claims an interest, but "does not apply to trust or restricted Indian lands," 28 U.S.C. 2409a(a), the Court concluded that petitioner's suit was not a Quiet Title Act suit because he claimed no real-property interest in the Bradley Property. 132 S. Ct. at 2207-2208.

2. In *Patchak*, the United States argued that permitting suits such as petitioner's would pose significant barriers to Indian tribes' ability to promote investment and economic development on lands taken into trust by the Secretary. 132 S. Ct. at 2209. The Court stated that this argument was "not without force, but it must be addressed to Congress." *Ibid.* In 2014, after petitioner's case had been remanded to the district court, Congress enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act or Act), Pub. L. No. 113-179, 128 Stat. 1913. In relevant part, the statute provides:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed. Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the

> actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

§ 2, 128 Stat. 1913.

3. Following the enactment of the Gun Lake Act, the district court dismissed petitioner's suit. Pet. App. 27a-48a. The court explained that the "clear intent" of Congress was "to moot this litigation" and that, barring some constitutional infirmity in the Act, the court lacked jurisdiction over the case. *Id.* at 36a.

a. The district court rejected petitioner's argument that Section 2(b) of the Gun Lake Act violated the separation-of-powers principle of Article III of the Constitution. Pet. App. 37a-42a. The court acknowledged that in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court declined to give effect to a statute that "prescribe[d] [a] rule[] of decision" to the judiciary in a pending case. Pet. App. 38a. The court further explained, however, that this Court's cases applying the holding of *Klein* have clarified that "the Constitution is not offended when Congress amends substantive federal law, even if doing so affects pending litigation." *Id.* at 38a-39a (citing *Miller* v. *French*, 530 U.S. 327, 348-350 (2000); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)).

The district court concluded that Section 2(b) of the Gun Lake Act did not violate separation-of-powers

principles under this Court's cases. Pet. App. 39a. The court explained that the Gun Lake Act "does not mandate a particular finding of fact or application of law to fact," but instead "withdraws this Court's jurisdiction to make any substantive findings whatsoever." *Id.* at 40a. "This," the court concluded, "Congress most assuredly can do." *Ibid.*

b. The district court further rejected petitioner's contention that Section 2(a) of the Gun Lake Act, which "reaffirm[s]" and "ratifie[s]" the Secretary's land-into-trust decision, violates separation-of-powers principles by superimposing Congress's own interpretation of the Indian Reorganization Act, but without amending the statute. Pet. App. 41a-42a. The court explained that Section 2(a) did not instruct any court to ratify the Secretary's action or compel any findings of fact or applications of law. *Id.* at 42a. Although "Congress lent its imprimatur to the Secretary's decision," it "stopped short of requiring the judiciary to do the same." *Ibid.*

c. The district court rejected petitioner's argument that the Gun Lake Act violated the Due Process Clause by requiring the court to dismiss his suit "without allowing him to fully litigate his claim." Pet. App. 45a. The court concluded that petitioner did not have a protected property interest in his ability to bring a suit. *Id.* at 46a.

4. a. The court of appeals affirmed. Pet. App. 1a-22a. The court held that the Gun Lake Act did not encroach upon the judicial power in violation of separation-of-powers principles. *Id.* at 8a-12a. The court rejected petitioner's argument that Congress may only affect the outcome of pending litigation by "directly amend[ing] the substantive laws upon which the

suit is based." *Id.* at 9a. The court observed that this Court has rejected constitutional challenges to new legislation that "compelled changes in law" without directly amending the underlying statute. *Id.* at 9a-10a (quoting *Robertson*, 503 U.S. at 436-437, 440; *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1318 (2016)). The court of appeals explained that Section 2(b) of the Gun Lake Act "provides a new legal standard [the court is] obliged to apply: if an action relates to the Bradley Property, it must promptly be dismissed." *Id.* at 11a-12a. The court concluded "that subject-matter jurisdiction over Mr. Patchak's claim has thus validly been withdrawn." *Id.* at 20a.

b. The court of appeals further concluded that the Gun Lake Act did not violate petitioner's due-process rights under the Fifth Amendment. Pet. App. 14a-16a. The court explained that, even assuming that petitioner had a property right to pursue his cause of action, "in a challenge to legislation affecting that very suit, the legislative process provides all the process that is due." *Id.* at 15a.

ARGUMENT

Petitioner contends (Pet. 16-24) that the Gun Lake Act violates separation-of-powers principles protected by Article III of the Constitution by directing that petitioner's suit be dismissed. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review of that claim is unwarranted. Petitioner further contends (Pet. 24-27) that the Gun Lake Act violates individual constitutional rights that are protected by principles of separation of powers. That contention lacks merit and was not pressed or passed upon below in its current form.

Further review of that claim is likewise unwarranted. The petition for a writ of certiorari should be denied.

1. a. Under the Constitution, Congress has broad power "to define and limit the jurisdiction of the inferior courts of the United States." *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That power includes the authority to withdraw jurisdiction previously given, and to subject pending cases to the new jurisdictional limitation. As this Court long ago explained, "[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fail." *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Other decisions have applied that basic principle. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly" applied intervening jurisdictional limitations to pending cases); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (noting that the Court has "consistently" adhered to the rule that "when a law conferring jurisdiction is repealed without any reservations as to pending cases, all cases fall with the law"); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) (holding that "[j]urisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress").

Under those cases, Congress's withdrawal of federal court jurisdiction to review actions relating to the Bradley Property does not raise any constitutional issue under Article III. Instead, it falls well within Congress's recognized authority to "give, withhold or restrict [federal-court] jurisdiction at its discretion, provided it not be extended beyond the boundaries fixed by the Constitution." *Kline*, 260 U.S. at 234 (citing *Stevenson* v. *Fain*, 195 U.S. 165 (1904); *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448 (1850); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *Turner* v. *Bank of N.-Am.*, 4 U.S. (4 Dall.) 8, 10 (1799)).

Petitioner contends (Pet. 21 n.7) that the Gun Lake Act does not remove jurisdiction from the federal courts over actions relating to the Bradley Property. That argument is misguided. Section 2(b) states that any suit relating to the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed," 128 Stat. 1913, which can only be understood as an exercise of Congress's power to limit the lower courts' authority to review specific cases or controversies.[1] Petitioner contends (Pet. 21 n.7) that Congress should have used the term "jurisdiction" rather than "shall not be filed or maintained" if it wanted to eliminate the jurisdiction of the district courts over suits like petitioner's concerning the Bradley Property. But the case cited by petitioner explains

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[1] Cf. *Keene Corp.* v. *United States*, 508 U.S. 200, 208-209 (1993) (concluding that 28 U.S.C. 1500, providing that the Court of Federal Claims shall not have "jurisdiction" over certain claims, "continu[es] to bar jurisdiction" in the same manner as its predecessor statute, which provided that "[n]o person shall file or prosecute" such claims) (citation omitted).

that "maintain" can mean anything from "bring[ing]" or "fil[ing]" a claim to "continu[ing] to litigate" a claim, *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695 (2003) (internal quotation marks omitted), which further demonstrates Congress's intent to capture cases in all procedural postures prior to final judgment and to require their dismissal or prohibit them from being filed.

b. Petitioner contends (Pet. 19) that Section 2(b) is similar to the statute at issue in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), which this Court declared unconstitutional under separation-of-powers principles. Petitioner's reliance on *Klein* is misplaced. In that case, Klein, the executor of an estate, sought to recover the value of property seized by the United States during the Civil War. The executor relied on a statute that authorized such a recovery upon proof that the decedent did not give aid and comfort to the enemy. *Id.* at 132-133. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), this Court had held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and that if the claimant offered proof of a pardon, the court was required to dismiss the case for lack of jurisdiction. *Klein*, 80 U.S. (13 Wall.) at 133-134. This Court held that the statute "passed the limit which separates the legislative from the judicial power." *Id.* at 147. The Court explained that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. The Court concluded that Con-

gress had exceeded its authority by changing the effect of a Presidential pardon that had previously been granted. *Id.* at 148.

Although the Gun Lake Act and the statute in *Klein* both contain provisions directing federal courts to dismiss a certain category of cases, those provisions operate in different ways. In *Klein*, the Court explained that, "[u]ndoubtedly the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect." 80 U.S. (13 Wall.) at 145. The problem in *Klein* was that other provisions of the statute mandated a rule of decision for the federal courts. The statute required courts to treat a Presidential pardon as proof of disloyalty and provided that whenever a judgment of the Court of Claims was based on a pardon, the Supreme Court would lose jurisdiction over the appeal. *Ibid.* The Court explained that the particular statute, which gave federal courts "jurisdiction * * * to a given point," but then required dismissal in certain factual circumstances, was "not an exercise of the acknowledged power of Congress to make exceptions * * * to the appellate power," but rather was a "denial of jurisdiction * * * founded solely on the application of a rule of decision." *Id.* at 146.

Unlike the statute in *Klein*, Section 2(b) of the Gun Lake Act eliminates a category of cases (cases relating to the Bradley Property) from the jurisdiction of the federal courts, regardless of what those cases are about or what the court in any pending case may have decided.

c. Furthermore, as the court of appeals correctly explained, the Court has clarified in subsequent cases that the Constitution is not offended simply because Congress has amended federal law in a way that affects pending litigation. For example, in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429, 438 (1992), the Court concluded that a statute enacted in response to pending litigation, which applied only to specific national forests in Washington and Oregon, posed no constitutional problem. *Id.* at 437. The statute provided that if an area of forests is managed in compliance with already-existing statutory provisions, that would be "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" specific cases pending in district courts within the Ninth Circuit. *Id.* at 435. The Court explained that the new provision "compelled changes in law, not findings or results under old law," and therefore was distinguishable from *Klein*. *Id.* at 438.

And in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016), the Court held that a statute that rendered a specific set of assets available to satisfy the liability and damages judgment underlying a specific enforcement proceeding (identified by docket number) did not violate separation-of-powers principles. *Id.* at 1317. The Court explained that Congress "may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative." *Ibid.*; see *id.* at 1325. The Court also explained that the statute in *Klein* infringed the judicial power "because it attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe." *Id.* at 1324. Section 2(b) of the Gun Lake Act presents no

such problem, because Congress unquestionably has the power to alter the jurisdiction of the federal courts, which is what required dismissal of petitioners' suit.

Similar to *Robertson* and *Bank Markazi*, the Gun Lake Act does not "direct any particular findings of fact" or require "applications of law, old or new, to fact." *Robertson*, 503 U.S. at 438. Although the Gun Lake Act did not change an applicable legal standard that courts would then be required to apply to facts in a pending case, the statute changed the applicable law by ratifying the land-into-trust decision that petitioner challenged and by eliminating federal-court jurisdiction over suits relating to the Bradley Property. In the latter respect, it is similar to the statute at issue in *National Coalition to Save Our Mall* v. *Norton*, 269 F.3d 1092 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002), which was enacted while a case was pending in district court and provided that administrative decisions approving the location of the World War II Memorial in Washington D.C., "shall not be subject to judicial review." *Id.* at 1094 (citation omitted). In *Bank Markazi*, this Court cited *Norton* as an example of a "law[] that governed one or a very small number of specific subjects" and nevertheless was "upheld as a valid exercise of Congress's legislative power." 136 S. Ct. at 1328.

Moreover, *Robertson* and *Bank Markazi* refute petitioner's contention (Pet. 16-20) that Congress contravened the separation of powers by changing the law in a way that required dismissal of his suit, but without directly amending the APA or the Indian Reorganization Act. In both of those cases, Congress affirmed the constitutionality of new legislation that

affected pending litigation brought under other statutes, without imposing petitioner's proposed limitation on Congress's lawmaking authority. *Robertson*, 503 U.S. at 436-437; *Bank Markazi*, 136 S. Ct. at 1326.[2]

d. Petitioner contends (Pet. 15-16) that there is tension between the court of appeals' decision and the Ninth Circuit's decision in *Seattle Audubon Society* v. *Robertson*, 914 F.2d 1311 (1990), rev'd, 503 U.S. 429 (1992). According to petitioner, when this Court reversed the Ninth Circuit's decision in that case, it did not address the Ninth Circuit's holding that a law is unconstitutional under *Klein* if it directs a decision in a pending case without amending the underlying law. Petitioner points out that, after *Robertson*, the Ninth Circuit continued to read *Klein* to mean that Congress violates the separation of powers when it "direct[s] certain findings in pending litigation, without changing any underlying law." Pet. 16 (quoting *Gray* v.

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[2] Petitioner observes (Pet. 8, 9, 22) that the House and Senate Reports stated that the Gun Lake Act "will not make any changes in existing law," Pet. 8 (citing S. Rep. No. 194, 113th Cong., 2d Sess. 4 (2014)), but that language does not prove petitioner's point. This language was included in the Senate committee report pursuant to Rule XXVI(12) of the Standing Rules of the Senate, which requires the committee to provide a "comparative print" of any legislation that "repeal[s] or amend[s] any statute or part thereof." Standing R. of the S., R. XXVI(12) (2013). Basically identical language was included in the House Report for the same reason under applicable House rules. R. of the H.R., R. XIII(3) (2015). That language in the Reports thus indicates that the Gun Lake Act would not require the amendment of any other statute. The Gun Lake Act certainly did, however, change existing law by ratifying the Secretary's decision to take the Bradley Property into trust and by eliminating federal-court jurisdiction over certain types of suits.

First Winthrop Corp., 989 F.2d 1564, 1568 (9th Cir. 1993)).

In each case petitioner cites, however, the Ninth Circuit concluded that Congress changed the underlying law. See *Ecology Ctr.* v. *Castaneda*, 426 F.3d 1144, 1149-1150 (2005) (concluding that statute at issue changed the underlying law); *Gray*, 989 F.2d at 1568-1570 (same). Petitioner thus has identified no case in which a statute was declared unconstitutional because it required a certain outcome in a case without amending the underlying law. And in any event, the Gun Lake Act did "supply new law," *Robertson*, 503 U.S. at 439, by ratifying the land-into-trust decision petitioner challenged and by eliminating federal-court jurisdiction over suits relating to the Bradley Property.

e. As petitioner concedes (Pet. 13), the Gun Lake Act is a statute of limited reach and does not present a question of nationwide importance. The Act affects only one parcel of land in Michigan, and its constitutionality has already been thoroughly examined by two federal courts. Petitioner contends (Pet. 12) that the threat to separation of powers is "particularly grave" where Congress acts with respect to one particular lawsuit. The Gun Lake Act, however, removes federal court jurisdiction over any suit involving the Bradley Property, not only the one brought by petitioner. In any event, as the Court recently explained in *Bank Markazi*, there is nothing inherently suspect about particularized legislation, and this Court and other courts have consistently "upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." 136 S. Ct. at 1328; cf. *Plaut* v. *Spendthrift*

Farm, Inc., 514 U.S. 211, 239 n.9 (1995) (laws may "impose a duty or liability upon a single individual or firm" without offending constitutional separation-of-powers principles).

Nor is petitioner correct (Pet. 16) that the Gun Lake Act is somehow constitutionally infirm because this Court previously held that petitioner's suit in particular "may proceed." *Ibid.* (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2203 (2012)). This Court held that petitioner had prudential standing and that his APA suit could therefore proceed, *Patchak*, 132 S. Ct. at 2210, given the state of the law at the time. But Congress has since enacted a statute that ratified the administrative decision petitioner challenged under the APA and bars judicial review of petitioner's claims by withdrawing federal-court jurisdiction over them. The APA expressly does not apply when a "statute[] preclude[s] judicial review." 5 U.S.C. 701(a)(1). Petitioner cites (Pet. 18-19) cases stating that Congress may not, consistent with Article III of the Constitution, revise or suspend a final judgment of a federal court. That principle is inapplicable here because petitioner never received a final judgment. Petitioner's suit was dismissed at the summary-judgment stage for lack of jurisdiction, following an interlocutory appeal on the question of his standing.

2. The court of appeals addressed only whether Congress could require dismissal of an APA challenge to the Secretary's land-into-trust decision through Section 2(b) of the Gun Lake Act and did not reach the merits of petitioner's underlying claims or the validity of Section 2(a) of the Gun Lake Act. Petitioner's discussion (Pet. 21-24) of whether Section 2(a) of the Gun

Lake Act "put the Bradley Property into trust" (Pet. 22), and his speculation about various legal questions such an action by Congress would raise, are therefore beside the point. Petitioner raised no challenge to the validity of Section 2(a) in the court of appeals, and Section 2(b) eliminates jurisdiction over petitioner's suit in any event.

Nor is there any occasion for this Court to grant review because the dismissal of petitioner's suit may foreclose the possibility of his receiving an "award of costs and reasonable attorneys' fees." Pet. 23. That is no more a basis for a writ of certiorari in this case than it would be in any case that is dismissed following an intervening change in the law. Even were petitioner's case to continue, he would not be entitled to attorneys' fees unless he ultimately were a "prevailing party." 28 U.S.C. 2412(d)(1)(A). And even if he prevailed, his claim for fees would be subject to defenses by the United States, including those that can result in the award of no fees. 28 U.S.C. 2412(d)(1)(B).

3. Finally, Section 2(b) of the Gun Lake Act poses no threat to petitioner's individual liberty interests or to any rights secured to him by the Fifth Amendment. In making those arguments (see Pet. 24-27), petitioner misstates the Gun Lake Act's purpose and effect. Petitioner asserts (Pet. 25) that Congress "arrogated to itself the judicial role of deciding [p]etitioner's APA claim." Section 2(b) of the Gun Lake Act, however, does not decide the merits of petitioner's APA claim or any other claims concerning the Bradley Property. Rather, it declares such claims to be outside the federal courts' jurisdiction and therefore leaves them unadjudicated. For the same reasons that Congress did not violate the separation of powers, see pp. 7-14,

supra, Congress did not infringe on any individual right petitioner may have to be free of congressional encroachment on the role of the judiciary. And under basic principles of sovereign immunity, petitioner has no property right to bring a suit against the United States.

Petitioner further contends (Pet. 26-27) that he has been subjected to disparate treatment in violation of his right to equal protection guaranteed by the Due Process Clause of the Fifth Amendment. *Ibid.* (citing *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954)). That argument "was not pressed or passed upon below" and therefore provides no basis for certiorari. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). In any event, the claim lacks merit. That the Gun Lake Act currently affects petitioner and no other claimant raises no constitutional concern unless the statute was "arbitrary or inadequately justified." *Bank Markazi*, 136 S. Ct. at 1327 n.27 (citing *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 305-306 (1976) (per curiam)). The Gun Lake Act is neither, having been explained in two congressional committee reports that provide valid legislative reasons for the statute's enactment.

The express purpose of the Gun Lake Act was to "provide certainty to the legal status of the land, on which the Tribe has begun gaming operations as a means of economic development for its community." S. Rep. No. 194, 113th Cong., 2d Sess. 2 (2014). Economic certainty and the finality of governmental decisions are legitimate governmental purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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